

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket No. 97-213

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Communications Assistance for Law
Enforcement Act

REPLY COMMENTS OF
THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY	2
II. WITH THE EXCEPTION OF THE FBI/DOJ, ALL PARTIES AGREE THAT J-STD-025 SHOULD BE SANCTIONED WITHOUT THE ADDITION OF THE PUNCH LIST ITEMS	3
III. THE RECORD REFLECTS THAT IT WILL BE EXTREMELY EXPENSIVE TO IMPLEMENT THE CORE STANDARD EVEN WITHOUT THE PUNCH LIST ITEMS.....	6
IV. CONTRARY TO FBI/DOJ’S ASSERTION, “REASONABLY AVAILABLE” INCLUDES AN ELEMENT OF COST DETERMINATION	10
V. THERE IS NO MERIT TO THE SUGGESTION THAT CLONE PAGERS ARE AN INADEQUATE MEANS OF SATISFYING THE ASSISTANCE CAPABILITY REQUIREMENTS FOR TRADITIONAL PAGING PROVIDERS	13
VI. CONCLUSION.....	15

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**REPLY COMMENTS OF
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The Personal Communications Industry Association ("PCIA"),¹ by its attorneys, hereby respectfully submits its reply to the comments filed in response to the Commission's Further Notice of Proposed Rulemaking in the above-captioned proceeding.² As described in greater detail below, the vast majority of the commenters in this proceeding agree that the Commission should denominate J-STD-025—without the addition of any punch list items—as the FCC-sanctioned standard for CALEA-compliant local exchange, cellular, and broadband PCS

¹ PCIA is an international trade association established to represent the interests of both the commercial and private mobile radio service communications industries and the fixed broadband wireless industry. PCIA's Federation of Councils includes: the Paging and Messaging Alliance, the Broadband PCS Alliance, the Site Owners and Managers Association, the Association of Wireless Communications Engineers and Technicians, the Private Systems Users Alliance, the Mobile Wireless Communications Alliance, and the Wireless Broadband Alliance. As the FCC-appointed frequency coordinator for the 450-512 MHz bands in the Business Radio Service, the 800 MHz and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of FCC licensees.

² Communications Assistance for Law Enforcement Act, CC Docket No. 97-213, *Further Notice of Proposed Rulemaking*, FCC 98-282 (rel. Nov. 5, 1998) ("FNPRM").

equipment. Further, in discussing the messaging industry, although few commenters focused on the appropriate standard for one-way paging, PCIA believes the record developed thus far in this proceeding demonstrates, *inter alia*, that cloned pagers are a legally sufficient means of meeting the assistance capability requirements for traditional paging services.

I. INTRODUCTION AND SUMMARY

This proceeding produced a divided record that pitted the entire telecommunications industry—including PCIA—against representatives of the law enforcement community, led by the Federal Bureau of Investigation and Department of Justice (“FBI/DOJ”). The telecommunications industry presented a strong legal and factual argument that J-STD-025, which was developed over a number of years in close consultation with law enforcement officials, is a reasonable means of implementing the assistance capability requirements of Section 103 of CALEA. The industry further made a strong case that it will be extremely expensive to implement J-STD-025, even without the addition of the punch list items, and that the addition of these items will transform an expensive undertaking into a financially intolerable project.

In the face of these industry demonstrations, the FBI/DOJ attempted to argue that the Commission is required to add its desired punch list items to J-STD-025, regardless of the cost of these items. However, Section 103 of CALEA states that only “call identifying information that is reasonably available” to a carrier pursuant to Section 103 must be provided to law enforcement officials. Had Congress intended that law enforcement have unbridled access to all call identifying information, it would not have used the term “reasonably” in drafting Section 103.

The FBI/DOJ have forgotten that critical element, and therefore their contention must be rejected.

In evaluating the record in this proceeding, the Commission must not allow law enforcement to use this rulemaking as a vehicle for gold plating its electronic surveillance capabilities at the expense of the American ratepayer. The commenting parties have demonstrated that J-STD-025, consistent with CALEA, preserves law enforcement's crime fighting capabilities without precipitating a substantial increase in telephone rates, or violating subscriber privacy. As such, J-STD-025 should be sanctioned by the Commission as a Section 107 safe harbor standard for two-way voice telephony.

Finally, the Commission must reject any contention that cloned pagers are not a legally sufficient means of meeting the assistance capability requirements for traditional paging services. Some representatives of law enforcement have argued that cloned pagers are insufficient because these devices do not provide law enforcement officials with the telephone number of the paging party. As described in PCIA's Specification for Traditional Paging, however, the paging party's telephone number is not "reasonably available" to paging carriers, and carriers are therefore under no statutory obligation to provide such numbers to law enforcement officials.

II. WITH THE EXCEPTION OF THE FBI/DOJ, ALL PARTIES AGREE THAT J-STD-025 SHOULD BE SANCTIONED WITHOUT THE ADDITION OF THE PUNCH LIST ITEMS

All of the commenters in this proceeding—except the FBI/DOJ and other law enforcement agencies—agreed with PCIA's opening round position that J-STD-025 represents a reasonable compromise between law enforcement's needs, cost, technical feasibility, and privacy, and therefore that J-STD-025 should be sanctioned by the FCC. As noted by AirTouch

Communications (“AirTouch”), “industry-developed requirements carry a strong presumption of validity and are not to be set aside or supplanted by the Commission lightly.”³ BellSouth adds that J-STD-025 “implement[s] CALEA’s technical requirements most effectively and efficiently, and that J-STD-025 “constitutes ... a final and appropriate safe harbor standard.”⁴ Finally, GTE concludes that “the Commission should respect the fact that the industry, in consultation with law enforcement, has spent more than three years reaching a comprehensive standard, and denominate J-STD-025 as the FCC-sanctioned safe harbor standard.”⁵

Virtually all parties also agreed with PCIA that Congress intended CALEA to maintain the *status quo* regarding law enforcement’s ability to engage in electronic surveillance, and that by seeking the addition of the punch list items, the FBI/DOJ is impermissibly attempting to circumvent CALEA’s limitations.⁶ In addition, there was consensus that in evaluating any punch list item, the needs of law enforcement must be balanced against implementation costs—which will ultimately be borne by ratepayers—and the privacy rights of the American public.⁷ As stated by TIA, J-STD-025 represents “industry’s careful and successful efforts to develop a

³ AirTouch Comments at 28-29.

⁴ BellSouth Comments at 2.

⁵ GTE Comments at 5. *See also* Ameritech Comments at 2 (supports the adoption of J-STD-025 and the rejection of the punch list items); USTA Comments at 2 (J-STD-025 “is not deficient,” and “provides law enforcement with all of the capabilities required by CALEA”); SBC Comments at i (urging the Commission to “adopt J-STD-025, without modification, as the appropriate technical standard for CALEA compliance”).

⁶ *See e.g.*, Bell Atlantic Comments at 2-4.

⁷ AirTouch Comments at 6-7 (citing Section 107(b) of CALEA). *See also* BellSouth Comments at 6-7; U S WEST Comments at 2.

reasonable solution that balances the competing interests of law enforcement, privacy and technological innovation.”⁸

The telecommunications industry further unanimously agrees that the punch list items are not “call identifying information that is reasonably available” to the carrier within the meaning of Section 103. AirTouch,⁹ AT&T,¹⁰ the CTIA,¹¹ SBC,¹² TIA,¹³ U S WEST,¹⁴ and USTA¹⁵ all joined with PCIA in demonstrating why each of the punch list items is not required by CALEA and therefore should not be included in J-STD-025.

Against this background of absolute consensus by the telecommunications industry, the Commission should not add any punch list items to the J-STD-025, which already meets law enforcement’s needs, thus saving ratepayers from unreasonable costs and protecting subscriber privacy. The record reflects that J-STD-025 satisfies the requirements of Section 103 and, as such, should be endorsed by the Commission.

⁸ TIA Comments at 25.

⁹ AirTouch Comments at 13-27.

¹⁰ AT&T Comments at 7-22.

¹¹ CTIA Comments at 24-37.

¹² SBC Comments at 11-18.

¹³ TIA Comments at 26-43.

¹⁴ U S WEST Comments at 11-24.

¹⁵ USTA Comments at 13-18.

III. THE RECORD REFLECTS THAT IT WILL BE EXTREMELY EXPENSIVE TO IMPLEMENT THE CORE STANDARD EVEN WITHOUT THE PUNCH LIST ITEMS

As highlighted in these comments, there is overwhelming support in the record for the legal conclusion that the punch list items sought by law enforcement are not mandated under the statutory language of Section 103. Moreover, the record indicates that the implementation of the punch list items would add significantly to an already expensive compliance bill. Thus, the Commission should, pursuant to its authority under Sections 107(b)¹⁶ and 109(b)(1)¹⁷ of CALEA, reject law enforcement's attempt to include the punch list capabilities and not require carriers to implement and deploy these additional items.

The cost estimates of implementing J-STD-025 *without any of the punch list items* indicate that CALEA compliance will be extremely expensive. The record includes estimates of the compliance costs of four of the five Regional Bell Operating Companies and GTE. The combined estimated cost for those carriers alone is a staggering \$831 million.¹⁸ Costs for other carriers will easily run into the millions of dollars and will likely double the figure provided by the large LECs. For example, even if the estimate for nationwide local exchange carrier costs is based on the lowest per switch modification cost in the record,¹⁹ the total cost of implementing J-

¹⁶ 47 U.S.C. § 1006 (b).

¹⁷ 47 U.S.C. § 1008(b)(1).

¹⁸ See Ameritech Comments at 4 (\$69 million, no fee estimate included); Bell Atlantic Comments at 14 (\$15 million, switches only); BellSouth Comments at 5-6 (\$347 million); GTE Comments at 7 (\$400 million).

¹⁹ See Nextel Comments at 22 (\$250,000 per switch).

STD-025 for local exchange carriers alone is \$1.73 billion, and this number does not include remote switches.²⁰

This \$1.73 billion CALEA price tag for the core standard does not include the cost of modifying the equipment used by wireless carriers. The record shows that the costs of implementing CALEA capabilities will not be any less costly in this telecommunications sector. For example, AT&T Wireless Services estimates that it will need to spend over \$35 million to bring its system into compliance with J-STD-025 (roughly \$500,000/switch).²¹ BellSouth has projected that it will cost its wireless companies between \$40-50 million to comply with J-STD-025.²² An extremely conservative estimate of the nationwide costs²³ based on AT&T's per switch modification costs yields a total compliance cost for the wireless industry of \$639 million, *just to implement J-STD-025*.

Implementation of the additional items included in the punch list will drive these already significant costs even higher. BellSouth estimates that the addition of the punch list items will drive up its compliance costs by thirty-five percent, or an additional \$122 million, thus

²⁰ According to the Commission's *Statistics of Communications Common Carriers*, the total number of switches in the U.S. is 6,929. *Statistics of Communications Common Carriers: 1997*, FCC/CCB, Table 2.4 (rel. Nov. 1998).

²¹ AT&T Comments at 28-29. This estimate does *not* include a number of other costs, like licensing fees that many carriers feel could actually double the costs. *See Ameritech Comments* at 4 (noting that manufacture's fees could double cost estimates).

²² BellSouth Comments at 6.

²³ The calculation is based on the assumption of 1 wireless switch in each of the 734 cellular license areas, 1 switch in each of the 51 PCS major trading areas ("MTAs") and 1 switch in each of the 493 PCS basic trading areas ("BTAs"). This ignores, of course, the fact that there are two cellular licensees in each cellular license area, two broadband PCS licensees in each MTA, and four PCS licensees in each BTA.

increasing its total CALEA implementation costs to \$469 million.²⁴ Using this multiplier, the earlier estimated LEC CALEA price tag of \$1.73 billion swells to \$2.34 billion. This figure is consistent with USTA's estimate of the cost of implementing J-STD-025 plus the additional punch list items, which is between \$2.2 and \$3.1 billion.²⁵ Again, these figures do not include the additional costs that would be incurred by carriers if the punch list items were to be added to J-STD-025.

Law enforcement apparently is aware of the staggering costs of CALEA implementation and is attempting to shield the Commission from the resulting "sticker shock." Specifically, cost data from various equipment vendors was provided to the FBI and DOJ at an earlier stage of the overall CALEA proceedings. Despite repeated requests from the industry to obtain such figures, however, the FBI and DOJ have steadfastly refused to cooperate and provide this data to other parties. The only clue that these figures indicate that the cost of implementing the punch list items would be significant is the admission of the Attorney General that the costs of complying with the core standard *alone* is approximately \$2 billion.²⁶ The telecommunications industry, however, the group that will actually implement these capabilities, has not been given an opportunity to review the data that contributed to the Attorney General's \$2 billion estimate, nor evaluate the data against its own cost estimate.

²⁴ BellSouth Comments at 5-6.

²⁵ See USTA Comments at 8.

²⁶ See Letter from Attorney General Janet Reno, *et al.* to Honorable Ted Stevens (Oct. 6, 1998).

Despite the large sums of money that carriers will need to spend to implement CALEA, law enforcement has resisted its obligation to assist carriers financially as they are required to under the Act. Section 109 of CALEA, in specific situations, provides for the reimbursement of carriers “for all reasonable costs directly associated with the modifications performed by carriers” to comply with CALEA.²⁷ The FBI, however, has attempted to shortchange the industry and block reimbursement of reasonable costs by unreasonably defining the terms “installed or deployed.” As PCIA has argued in federal district court, not only does this approach make specific statutory language superfluous, contrary to the fundamental dictates of statutory interpretation, it has the effect of making carriers liable for the costs of retrofitting *all* of their post-1995 equipment.²⁸

The costs of compliance will need to be recovered. That was Congress’ clear intent when it enacted CALEA. In the absence of appropriate government reimbursement, carriers will be required to turn to their ratepayers to pay for law enforcement’s surveillance capabilities. Given the magnitude of the costs of compliance for the core standard highlighted above, the need to pass along these costs raises additional concerns under Section 109(b)(1), which requires the Commission to evaluate a capability requirement’s “effect on rates for basic residential telephone service.”²⁹ Needless to say, such enormous costs could be absolutely devastating to the wireless industry.

²⁷ 47 U.S.C. § 1008(a).

²⁸ *See PCIA, et al. v. Reno*, Nos. 98CV01036, 98CV02010 (D.D.C. filed April 27, 1998).

²⁹ 47 U.S.C. § 1008(b)(1)(B).

IV. CONTRARY TO FBI/DOJ'S ASSERTION, "REASONABLY AVAILABLE" INCLUDES AN ELEMENT OF COST DETERMINATION

As demonstrated in PCIA's opening comments, cost plays an important role in the Commission's evaluation of whether call-identifying information is "reasonably available" under Section 103. Section 109 of CALEA is a strong indicator that Section 103's term "reasonably available" includes a cost component. Although Section 109 governs petitions filed by individual carriers maintaining that a capability requirement is not "reasonably achievable," it nevertheless provides guidance on interpreting the term "reasonably available" in Section 103. Congress directed the Commission in Section 109 to consider a list of factors in determining whether compliance is "reasonably achievable." This list includes several factors that either directly or indirectly concern the price of the technology or the overall effect of the cost on carriers.³⁰ While Section 103 does not have an explicit list defining "reasonability," the Commission should not hesitate to consider the factors listed in Section 109 in determining what Congress meant by "reasonable" in Section 103. In so doing, the Commission will be faithfully looking to the context of CALEA to define an ambiguous term.³¹

Other commenters agree with PCIA's conclusion that cost should be considered in determining whether a capability is "reasonably available." SBC, for example, maintains that when the Commission determines if call identifying information is "reasonably available," it should assess, *inter alia*, whether "the cost for one feature [is] disproportionately more than the

³⁰ 47 U.S.C. § 1008(b)(1)(B), (D), (E), (H).

³¹ See *AT&T Corp. v. Ameritech, et al.*, File Nos. E-98-41, *et al.*, *Memorandum Opinion and Order*, FCC 98-242, ¶ 28 (rel. Oct. 7, 1998) (an agency "consider the statutory context in which the term is used to give it precise meaning").

cost attributable to the other CALEA features, [thus] jeopardizing the reimbursement to be received.”³² Likewise, Ameritech suggests that the Commission consider the cost of “developing a specific technical functionality” in determining whether it is reasonably available.³³ TIA also notes that when the provision of information requires modifications that are extraordinarily difficult and expensive, such information is not reasonably available.³⁴

TIA, as do other commenters, encourages the Commission to adopt the definition of “reasonably available” included in J-STD-025.³⁵ PCIA agrees and points out to the Commission that the J-STD-025’s definition of “reasonably available” contemplates cost considerations. As BellSouth notes:

The meaning [of “reasonably available” as set forth in J-STD-025] is that call-identifying information is reasonably available at a network element (typically a network switch) only if it is used or generated by that network element in the course of call processing to provide services to the subscriber. Thus, network protocols that support call processing in carrier networks should not be modified solely to transport surveillance information. *Such modification to the fundamental infrastructure of telecommunications networks would be prohibitively expensive . . .*³⁶

In the face of this record evidence to the contrary, the FBI/DOJ nevertheless erroneously maintains in its opening comments that the term “‘reasonable availability’ . . . is a technical

³² SBC Comments at 4.

³³ Ameritech Comments at 3.

³⁴ TIA Comments at 23.

³⁵ TIA Comments at 24. *See also* BellSouth Comments at 11-12; AT&T Comments at 4.

³⁶ BellSouth Comments at 12 (emphasis added).

concept, not a financial one.”³⁷ The FBI/DOJ also contends that because “Congress has explicitly incorporated cost considerations into the determination of ‘reasonable achievability’ under Section 109(b),” it would be redundant to incorporate cost considerations into the “reasonably available” language of Section 103.³⁸

Critically, the FBI/DOJ’s interpretation of “reasonably available” fails to withstand scrutiny when Section 103 is read for its plain meaning. Based on the plain meaning of Section 103, there is no reason to limit “reasonably available” to a technical concept. To the contrary, cost must be a factor, otherwise the term “reasonably” is read out of Section 103. As pointed out in PCIA’s opening comments, almost anything is technically feasible if enough resources are applied. Further, as noted above, had Congress intended that carriers provide law enforcement officials with *all* call identifying information, it would have said so. Rather, it limited carriers’ obligations to providing “reasonably available” call-identifying information. Thus, Congress contemplated that law enforcement agencies *would* be denied access to some call-identifying information.

Finally, the FBI/DOJ claims that cost cannot be a factor in evaluating “reasonable availability” because if particular call identifying information is found to be not “reasonably available” under Section 103, law enforcement officials will not have access to this information, even if they are willing to pay for it.³⁹ This argument is flawed for two reasons. First, as evidenced by the inclusion of language limiting the type of call-identifying information that must

³⁷ FBI/DOJ Comments at 13.

³⁸ *Id.* at 14.

³⁹ FBI/DOJ Comments at 15.

be provided, *i.e.*, “reasonably available,” Congress did not envision that law enforcement would have access to *all* call-identifying information. Second, the FBI/DOJ has again failed to recognize that while some call-identifying information may be “technically” available, the cost of providing the information would be excessive for *all carriers*. The FBI/DOJ appears to suggest that it would be willing and able not only to participate in Section 109 proceedings initiated by all carriers in the industry, but also to incur the costs associated with industry-wide network modifications that would be necessary for all carriers to provide the costly call-identifying information.

V. THERE IS NO MERIT TO THE SUGGESTION THAT CLONE PAGERS ARE AN INADEQUATE MEANS OF SATISFYING THE ASSISTANCE CAPABILITY REQUIREMENTS FOR TRADITIONAL PAGING PROVIDERS

With regard to the messaging industry, after long study and deliberation, including discussions with law enforcement representatives, PCIA has developed a Section 107 safe harbor standard for traditional paging providers, whereby such providers will meet the assistance capability requirements through the provision of cloned pagers.⁴⁰ PCIA stands by this industry standard for traditional paging, and urges the Commission to reject any attacks on the use of cloned pagers by traditional paging providers to satisfy the legitimate electronic surveillance needs of law enforcement officials.

Only one entity, the New York City Police Department (“NYPD”) argues that “clone pagers do not provide law enforcement the ability to collect all call-identifying (*e.g.*, trap and

⁴⁰ PCIA Technical Committee, CALEA Subcommittee, CALEA Specification for Traditional Paging, version 1.0, at § 2.

trace) information as required by CALEA.⁴¹ The NYPD goes on to insist that when “a surveillance order is issued for a pager,” the law enforcement agency must be provided with the telephone number of the paging party.⁴²

Because the telephone number of the paging party is not “call identifying information that is reasonably available” to the paging carrier, pursuant to Section 103 of CALEA, paging carriers are not required to provide this information to law enforcement officials. The CALEA Specification for Traditional Paging clarifies this point, stating that, “For traditional paging, reasonably available call-identifying information is limited to the subject’s radio receiving device address that is available through monitoring the radio transmission channel. *The call origin is not reasonably available in most PSP [Paging Service Provider] installations* but may be obtained through the originating service provider”⁴³

Thus, the NYPD is requesting that paging carriers provide specific call identifying information that is neither required by Section 103 nor by the paging industry’s safe harbor standard. As such, the Commission must reject this request.

⁴¹ NYPD Comments, ¶ 24.

⁴² *Id.*

⁴³ CALEA Specification for Traditional Paging, version 1.0, at § 3 (emphasis added).

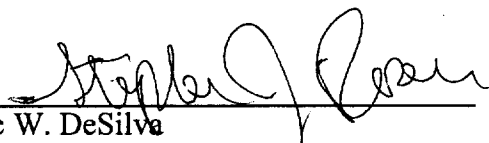
VI. CONCLUSION

The punch list items desired by the FBI/DOJ are not “reasonably available call identifying information,” and will make CALEA implementation—which is already a costly proposition—financially impractical. Every commenter, except law enforcement agencies, agrees with this. Thus, the Commission should accept J-STD-025 as the Section 107 safe harbor standard for traditional two-way voice telephony and refuse to add any of law enforcement’s additional features to the industry approved standard. The Commission should also refuse to require traditional paging carriers to provide law enforcement officials with the telephone number of the paging party.

Respectfully submitted,

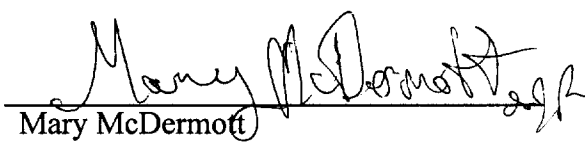
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